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REINHART BOERNER VAN DEUREN P.C.
2215 PERRYGREEN WAY
ROCKFORD, IL 61107

EXAMINER

MARSH, STEVEN M

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**BEFORE THE BOARD OF PATENT APPEALS
AND INTERFERENCES**

Application Number: 10/743,215
Filing Date: December 22, 2003
Appellant(s): BRINKMAN ET AL.

MAILED

SEP 12 2007

GROUP 3600

Andrew J. Heinisch
For Appellant

EXAMINER'S ANSWER

This is in response to the appeal brief filed November 21, 2005 appealing from the Office action mailed April 29, 2005. In response to the action by the Board of Patent Appeals on January 4, 2007, the action mailed on February 15, 2006 is vacated and replaced with this action.

(1) Real Party in Interest

A statement identifying by name the real party in interest is contained in the brief.

(2) Related Appeals and Interferences

The examiner is not aware of any related appeals, interferences, or judicial proceedings which will directly affect or be directly affected by or have a bearing on the Board's decision in the pending appeal.

(3) Status of Claims

The statement of the status of claims contained in the brief is correct.

(4) Status of Amendments After Final

The appellant's statement of the status of amendments after final rejection contained in the brief is correct.

(5) Summary of Claimed Subject Matter

The summary of claimed subject matter contained in the brief is correct.

(6) Grounds of Rejection to be Reviewed on Appeal

The appellant's statement of the grounds of rejection to be reviewed on appeal is correct.

(7) Claims Appendix

The copy of the appealed claims contained in the Appendix to the brief is correct.

(8) Evidence Relied Upon

6,688,567 B2	Fast et al.	2-2004
6,708,436 B2	Nagel	3-2004

(9) Grounds of Rejection

The following ground(s) of rejection are applicable to the appealed claims:

Claim Rejections - 35 USC § 103

Claims 1-16 are rejected under 35 U.S.C. 103(a) as being unpatentable over U.S. Patent 6,688,567 B2 to Fast et al. in view of U.S. Patent 6,708,436 B2 to Nagel. Fast et al. discloses a partially translucent, PVC label holder (see fig. 10) with a back panel (18) connected to a front portion (50 and 52) for holding a sign therebetween. There is a top flange (54) proximate a top portion of the back panel and a shelf clip portion (16) in contact with the top flange, but spaced rearward from the back panel at the bottom. There is an upward retaining flange (32) and a downward angled portion terminating in a catch flange (122) and a curved resilient hinge portion (120) extended from the downward angled portion and wrapping around the catch flange to form an

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upward flange. The retaining flange can pivot in response to an upward pivoting movement of the back panel and the catch flange is configured to engage a lower shelf channel flange. The downward angled engaging portion is not disclosed as 20 degrees from vertical, but the specific angle is a matter of design preference that would have been obvious to one of ordinary skill in the art at the time of the present invention.

Fast et al. does not disclose a label holder with a front panel connected to the back panel along a bottom portion to form a cavity therebetween. Nagel discloses a label holder with a sign holding portion (formed by 11 and 12) and a clip portion (15). The sign holding portion has a translucent front panel (11) and a back panel (12) connected to the front panel along a bottom portion thereof, forming a cavity therebetween. There is a top flange (19, 20, 22, and 23) extending forward from the back panel and having a downward depending edge. It would have been obvious to one of ordinary skill in the art at the time of the present invention to have replaced the sign holding portion taught by Fast et al. (18, 50, and 52), with the sign holding portion taught by Nagel (11 and 12), for the purpose of providing a more secure holding arrangement for a sign. Nagel does not disclose whether the back panel (12) is transparent or opaque, but Fast et al. teaches the use of an opaque panel and transparent front panel to allow a passerby to view a label in a pocket. It would have been obvious to one of ordinary skill in the art at the time of the present invention to have utilized that teaching and formed the back member of an opaque PVC material.

Fast et al. in view of Nagel does not specifically disclose the label holder mounted on a C-channel shelf. However, Fast et al. discloses that the label holder can

be used with a C-channel shelf (col. 9, lines 5-12). Fast et al. in view of Nagel also fails to disclose the specific height of the label holder. However, the height of the label holder is a matter of design preference that would have been obvious to one of ordinary skill in the art at the time of the present invention.

(10) Response to Argument

In response to Applicant's argument that the use of member 18 as a "back panel" is erroneous, the use of a term contained in the specification does not change the fact that member 18 is a back panel in relation to a sign placed in front of the panel. Member 18 is a cover member for a label stored in pocket 17, but it is a back panel for a sign supported on the cover member. In response to Applicant's argument that an additional panel in front of the back panel would obstruct the visibility of labels contained in pocket 17 because of the added layer, it would be entirely dependent upon the layers. The information on a label could easily be viewed through two layers of transparent plastic.

In response to Applicant's argument that the modification of Fast et al. defeats the stated purpose and functional feature of Fast, the Examiner disagrees with Applicant's interpretation of Fast et al. The function of the clips taught by Fast et al. is to hold a sign as shown in figs. 1 and 2. Fast et al. only suggests that the clips are capable of accommodating the prior art sign holders and Fast et al. in view of Nagel would still be capable of performing that function, due to the pocket formed at the bottom of 19.

In response to applicant's argument that the examiner's conclusion of obviousness is based upon improper hindsight reasoning, it must be recognized that any judgment on obviousness is in a sense necessarily a reconstruction based upon hindsight reasoning. But so long as it takes into account only knowledge which was within the level of ordinary skill at the time the claimed invention was made, and does not include knowledge gleaned only from the applicant's disclosure, such a reconstruction is proper. See *In re McLaughlin*, 443 F.2d 1392, 170 USPQ 209 (CCPA 1971).

In response to applicant's argument that there is no suggestion to combine the references, the examiner recognizes that obviousness can only be established by combining or modifying the teachings of the prior art to produce the claimed invention where there is some teaching, suggestion, or motivation to do so found either in the references themselves or in the knowledge generally available to one of ordinary skill in the art. See *In re Fine*, 837 F.2d 1071, 5 USPQ2d 1596 (Fed. Cir. 1988) and *In re Jones*, 958 F.2d 347, 21 USPQ2d 1941 (Fed. Cir. 1992). In this case, Nagel teaches providing a front panel and a back panel to create a pocket that is used for a sign holding portion. It would be obvious to one of ordinary skill in the art at the time of the present invention to have utilized that teaching and substituted the sign holding portion taught by Nagel for the sign holding portion taught by Fast et al., to provide a more secure means for holding a sign contained within the sign holding portion.

Applicant also argues that making the back panel opaque would defeat the explicit purpose and function of the label holding pocket 17 of Fast. However, the

Examiner disagrees. Fast et al. specifically discloses that the material is not critical to the inventive concepts (col. 4, lines 46-60). The purpose of the label holding pocket is to hold labels and the transparency is disclosed as how the merchandising aid is commonly co-extruded. Therefore, making the back panel opaque would not defeat the explicit purpose and function of the pocket.

In response to Applicant's argument that there is no description of how the label holder taught by Fast et al. in view of Nagel is mounted to a C-channel, it is noted that Applicant is claiming the label holder not the C-channel shelf. The upward retaining flange (32) is capable of engaging a top support flange of a shelf. Applicant also argues that that part 32 does not come into contact with the upper flange of a C-channel shelf, but Applicant claims "a shelf clip portion joined to a top portion of the back panel. As shown in figure 3, the resiliency of hinge 20 appears to join the top portion of 18 and the "shelf clip portion" into contact.

(11) Related Proceeding(s) Appendix

No decision rendered by a court or the Board is identified by the examiner in the Related Appeals and Interferences section of this examiner's answer.

For the above reasons, it is believed that the rejections should be sustained.

Respectfully submitted,

/Steven Marsh/
Steven M. Marsh
Examiner
Art Unit 3632

Conferees:

Robert Olszewski and Peter Cuomo

/Robert Olszewski/

/PMC/

July 23, 2007